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InterDent Service Corporation

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

POCATELLO DENTAL GROUP, P.C., an Idaho professional corporation,

Plaintiff,

v.

INTERDENT SERVICE CORPORATION, a Washington corporation,

Defendant.

INTERDENT SERVICE CORPORATION, a Washington corporation,

Third-Party Plaintiff,

Case No. CV-03-450-E-LMB

DEFENDANT/THIRD-PARTY PLAINTIFF INTERDENT SERVICE CORPORATION'S OPPOSITION TO MOTION TO COMPEL PAYMENT OF ATTORNEYS' FEES AND COSTS

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v.

POCATELLO DENTAL GROUP, P.C., an Idaho professional corporation; DWIGHT G. ROMRIELL, individually; LARRY R. MISNER, JR., individually; PORTER SUTTON, individually; ERNEST SUTTON, individually; GREGORY ROMRIELL, individually; ERROL ORMOND, individually; and ARNOLD GOODLIFFE, individually,

Third-Party Defendants.

I. INTRODUCTION

Defendant/third-party plaintiff InterDent Service Corporation ("ISC") is somewhat at a loss to respond to a motion that is on its face so illogical and so procedurally confused. Some of the paradoxes raised by plaintiff's pleading, a pleading entitled "Motion to Compel Payment of Attorneys Fees and Costs," are as follows:

A. *Plaintiff wants ISC to pay plaintiff's fees for suing ISC twice, both in Idaho and in U.S. Bankruptcy Court, despite the fact that plaintiff has not prevailed in either case.* ISC's pending summary judgment motion makes clear that plaintiff's forum shopping necessitates the dismissal of all of plaintiff's claims, but more fundamentally, how can ISC possibly be obligated to pay plaintiff's attorneys' fees for filing and abandoning an adversary proceeding in bankruptcy court against ISC and then secretly and unilaterally filing this case?

B. Plaintiff purports to be moving under the Management Agreement, a document it also claims is illegal and that makes clear that *ISC*, not plaintiff, has the authority to retain counsel—if ISC is to pay for counsel. ISC did not authorize hiring counsel to, for example, file then abandon an adversary proceeding in bankruptcy court and secretly obtain a temporary restraining order in state court.

C. Plaintiff's shareholders irrevocably assigned to ISC the funds, the practice revenues, it wants to use to sue ISC in exchange for an upfront payment of millions of dollars. Now plaintiff wants the practice revenues back without repaying the millions of dollars its shareholders received.

D. Plaintiff is essentially filing an attorneys' fees petition in a case in which it has not prevailed and requesting attorneys' fees for its abandoned bankruptcy court action.

E. Plaintiff is moving to "compel" without seeking any discovery and *moving for summary judgment on a claim that has not been made* without filing a summary judgment motion. Alternatively, plaintiff is moving for provisional process, a claim it has never pled and without meeting any of the requirements for provisional process.

F. Plaintiff seeks to both enforce the Management Agreement if it somehow requires ISC to pay plaintiff's fees and at the same time to nullify the contract as illegal.

Plaintiff perhaps, subject to the Federal Rules of Civil Procedure, has a right to hire counsel to file duplicate, harassing litigation, but only out of its own pocket—out of the pockets of its shareholders. Although plaintiff has assigned the revenues from its dental practice to ISC, plaintiff's shareholders are nonetheless perfectly able to hire an attorney using their own funds. If they are unwilling to raise sufficient capital to litigate, unwilling to put their own money at risk, that is in itself a measurement of the merit of plaintiff's claims. Plaintiff's motion should be denied. If plaintiff insists on litigating the same meritless claims twice, its shareholders should pay their own way.

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II. ARGUMENT

A. Plaintiff's Motion Is Procedurally Improper

One way of looking at plaintiff's motion is that it is making a request for attorneys' fees under Fed. R. Civ. P. 54(d)(2) without actually having first obtained a judgment in its favor. Because the Management Agreement has a prevailing-party attorneys' fees clause (section 10.5),[1] there may ultimately be a Rule 54(d)(2) phase of this case, but that time has not yet come.

Another way of looking at plaintiff's motion, because it seeks a judgment of sorts, is that it is a motion for summary judgment under Rule 56. However, Rule 56(a) only authorizes a party to obtain summary judgment on a claim it has actually made, not on something from a free-floating wish list. Plaintiff seeks an order requiring ISC to immediately pay plaintiff's lawyers to sue ISC and to refund the fees incurred in bankruptcy for claims plaintiff abandoned. Nowhere in plaintiff's complaint does such a claim appear. Instead, the closest plaintiff comes is paragraph 37 of its complaint, which states:

> The Group has been required to retain the services of Cooper & Larsen, Chartered, to prosecute this action on its behalf. The Group reserves the right, after the effective date of InterDent's Chapter 11 Plan, to assert a claim for the recovery [of] its attorneys fees pursuant to applicable law, including without limitation, Idaho Code §§ 12-120(3), 12-121 and 10-1210 in such sums as the Court deems reasonable, together with actual costs incurred herein.

Obviously, no one "required" plaintiff to make and then abandon claims in bankruptcy court, secretly obtain a temporary restraining order, redirect the mail or to take any of its other misguided actions. Moreover, suggesting one might amend to make a claim in the future is not

[1] The Management Agreement is in the record in multiple locations, including as Exhibit 1 to the previously filed Affidavit of Bruce Call ¶ 3.

the same as actually doing so. Nor do the Idaho statutes cited provide any right to immediate payment. Idaho Code sections 12-120(3) and 12-121 provide for prevailing-party fee recovery, and section 12-121 provides for an award of costs in a declaratory judgment case. None of these statutes permits the recovery of fees by a party that has not prevailed. Instead, given that plaintiff concedes ISC is entitled to partial summary judgment against plaintiff's claims for damages during or before ISC's bankruptcy, the statutes may provide a basis for fee recovery by ISC—but again, only after a judgment is actually entered in ISC's favor.

Finally, plaintiff's motion might be considered a form of provisional process under Fed. R. Civ. P. 64 or 65. However, again, plaintiff cannot obtain provisional process on a claim it has not pled. Plaintiff also has not met any of the requirements for provisional process, including any showing of irreparable injury or probability of success on the merits. The fact that plaintiff's shareholders might be forced to invest in a lawsuit they insisted on filing (twice)[2] would not seem to constitute irreparable injury. Money damages, if plaintiff had a coherent legal theory, would be an adequate remedy.

Plaintiff's make-it-up-as-you-go motion can be denied summarily as procedurally improper.

B. Plaintiff's Theory Is Contrary to the Express Terms of the Management Agreement—in Addition to Being Contrary to Common Sense

Plaintiff's lead argument on the merits is telling about the position it is taking in this case: Plaintiff extrapolates from the proposition that ISC pays the practice expenses to a conclusion

[2] Plaintiff's plea of poverty—in addition to not constituting a viable legal theory—is unconvincing. Plaintiff's shareholders are highly compensated professionals. To fund litigation, if it insists on litigating, plaintiff could raise funds like any other company: through debt or equity. It could borrow the money, or its shareholders could put their own money at risk by injecting capital into the company, perhaps a portion of the millions of dollars they received from ISC's predecessors in 1996.

that plaintiff can unilaterally incur expenses, including those for suing ISC, while ISC writes the check. That is precisely what this litigation is about: Whether when third-party defendants received millions of dollars in consideration, in relevant part, for agreeing to be professionally managed, they have an obligation to allow ISC to manage the practice in an economically rational way. Plaintiff's theory, not surprisingly, is directly contrary to the express terms of the Management Agreement.

1. ISC, Not Plaintiff, Is Responsible for Retaining Counsel Under the Management Agreement

Preliminarily, plaintiff bases in its motion on Idaho law. However, the Management Agreement unambiguously states that California law controls. (Management Agreement § 10.8.) ISC does agree with plaintiff on one point, however: In California, as in Idaho, clear and unambiguous contract documents must be enforced. *Masonite Corp. v. Great American Surplus Lines Ins. Co.*, 224 Cal. App. 3d 912, 274 Cal. Rptr. 206, 210 (1990); *accord Reynolds v. Schuemaker*, 83 P.3d 135, 138 (Idaho App. 2003). Thus, when plaintiff complains about ISC's handling of the revenue from the practice, plaintiff forgets that under the unambiguous terms of the Management Agreement, in exchange for the payment of millions of dollars, it sold that revenue stream to ISC. Section 2.6(a) of the Management Agreement expressly provides:

> Group hereby assigns, sells, conveys, transfers and delivers to Manager all of assets of the Group of every, kind, character and description, whether tangible, intangible, real, personal, or mixed, and wherever located, including, but not limited to, all Revenues, cash accounts receivable, advances, prepaid expenses, deposits, equipment and improvements.

Thus it is ISC's revenue, not plaintiff's, that plaintiff is seeking to use to pay attorneys to sue ISC. And it is doing so under an agreement that expressly delegates to ISC, not to plaintiff, the authority for administrative decisions. (Management Agreement § 3.4(a)(2).) Included in

the administration of the practice are all services "necessary or appropriate for the efficient operation of the Practice," including "contracting." (Management Agreement § 4.1.) As plaintiff admits, ISC never authorized a contract with Cooper & Larsen or plaintiff's bankruptcy counsel. (*E.g.*, Motion ¶¶ 4, 5.) ISC also has authority for all operating aspects of the practice and all other related and incidental matters, including instituting certain legal actions (those for recovery of accounts). (Management Agreement §§ 4.5, 4.5(i), 4.6(6).)

Presumably, plaintiff does not contend that retaining counsel is an aspect of the practice of dentistry, *plaintiff's only area of responsibility under the Management Agreement*, without the approval of ISC. (Management Agreement § 3.2.) Therefore, even if retaining counsel were not within ISC's enumerated powers—and, as shown above, it is—retaining counsel would be a matter for the Joint Operations Committee, which consists of representatives of both ISC and plaintiff. (Management Agreement § 3.4(b).) The Joint Operations Committee did not approve retaining Cooper & Larsen to sue ISC (or for any other purpose) or the retention of plaintiff's bankruptcy counsel. ISC has no responsibility to pay for counsel not retained pursuant to the terms of the Management Agreement.

2. Hiring Counsel to Contend the Management Agreement Is Illegal Is Not a Practice Expense

Plaintiff makes the paradoxical contention that the Management Agreement requires ISC to pay for counsel to argue the Management Agreement is void as constituting the unlawful corporate practice of dentistry. Setting aside the logical conundrums arising from the fact that plaintiff seeks to both enforce and void the Management Agreement, even the provision of the Management Agreement plaintiff repeatedly quotes, section 2.6(b), does not assist plaintiff.

> (b) Liabilities. *Manager shall be responsible for paying all claims and obligations associated with the operation of Group*

pursuant to this Agreement; provided, Manager shall be deemed to discharge fully its responsibility to Group for the liabilities described in this subparagraph by its timely payment on Group's behalf of, or delivery to Group of an amount sufficient to discharge, all of Group's obligations and liabilities now existing or arising in the future, including those under Provider Subcontracts, Employment Agreements, Group's professional liability insurance and any other operational expense for which Group retains responsibility *or that are delegated to Group, whether pursuant to this Agreement or any other agreement of the parties or action of the Joint Operations Committee ("Group Expenses"). Notwithstanding the foregoing, Manager does not assume any liabilities of Group which are unrelated to the Practice or any liabilities for income taxes.*

(Emphasis added.)

ISC respectfully suggests that retaining counsel to contend the Management Agreement is illegal is not a liability or obligation "associated with the operation of the Group pursuant to this Agreement." Plaintiff also conveniently omits the highlighted language in its repeated quotation of section 2.6—as if plaintiff did not expect ISC or the Court to actually read the entire provision. Retaining the counsel in question is not, as is required by the second highlighted portion of section 2.6, above, pursuant to the Management Agreement, any other agreement of the parties or any action of the Joint Operations Committee. Instead, litigating what is, characterizing its charitably to plaintiff, a business dispute between the parties, is precisely the kind of expense "unrelated to the Practice" for which plaintiff agreed to pay its own way.

Plaintiff's request that ISC pay lawyers to sue ISC is directly contrary to the terms of the Management Agreement.

C. It Is Inherently Unfair for Plaintiff to Forum Shop at ISC's Expense—No Other Concept of Fiduciary Duty Supports Plaintiff's Position

Plaintiff apparently contends that ISC has a fiduciary duty to fund meritless, forum-shopping litigation against itself, a novel concept of fiduciary duty between sophisticated

business parties to a multimillion-dollar business arrangement. To the extent plaintiff's motion depends on the proposition that ISC somehow has custody over "the Group's income and revenues" (Plaintiff's Brief at 4), as discussed above, plaintiff assigned those revenues to ISC in exchange for an upfront payment to its shareholders. The funds are ISC's, not plaintiff's.

Moreover, in stating that there is a fiduciary duty, plaintiff assumes what it is trying to prove. The parties' relationship is simply a contractual one, not one subject to fiduciary duties. ISC provides administrative services to plaintiff assuring, if plaintiff would cooperate, that its practice is run efficiently. Recital E to the Management Agreement states:

> E. Group desires to retain Manager on an independent contractor basis to provide management services that are more particularly described below, and Manager desires to provide such management services under the terms and conditions set forth in this Agreement.

There is simply no fiduciary duty in these circumstances. The relationship between ISC and plaintiff is a debtor-creditor relationship. Out of the revenues plaintiff assigned to ISC, ISC remits approximately 38 percent of net collections for plaintiff's use in compensating its dentists. Under both controlling California law and in Idaho, no fiduciary duty exists in a debtor-creditor relationship. *Wolf v. Superior Court*, 107 Cal. App. 4th 25, 31-32, 130 Cal. Rptr. 860 (2003); *Black Canyon Racquetball Club, Inc. v. Idaho First National Bank*, 119 Idaho 171, 176, 804 P.2d 900 (1991). Nor does the fact that there is a profit-sharing aspect to the relationship necessitate a finding of fiduciary duty. *Wolf*, 107 Cal. App. 4th at 31-32. Instead, as made clear by recitals to the Management Agreement, the parties have an arm's-length, independent contractor relationship. *See id.* at 36 (no fiduciary duties in arm's-length contractual relationship).

And even if there were a fiduciary duty—and there is not—plaintiff cites no authority requiring a fiduciary to fund litigation against itself that it determines to be without merit. Fiduciary capacity, where it exists, entails the exercise of judgment and is not subject to control by the beneficiary (or the courts) except for abuse of discretion. *Estate of Marre*, 18 Cal. 2d 184, 190, 114 P.2d 586 (1941); *Copley v. Copley*, 126 Cal. App. 3d 248, 284, 178 Cal. Rptr. 482 (1981); Restatement (Second) of Trusts § 187 (1959). Thus plaintiff's theory that a fiduciary has no judgment whatsoever but must accede to any and all demands, no matter how unwarranted, of the person to whom they have a duty is contrary to established law. ISC suggests that no fiduciary has a duty to fund meritless litigation against itself.

D. The Duty of Good Faith Does Not Require ISC to Fund Meritless Litigation Against Itself

It is ironic that plaintiff contends ISC is acting in bad faith for taking actions that allegedly "violate[], nullify[] or significantly impair any benefit of the contract to the Group" when plaintiff is unabashedly seeking to have that same contract declared illegal and to "nullify" and "impair" ISC's potential benefit under the agreement, to be able to operate the practice profitably. *See Commercial Union Assur. v. Safeway Stores*, 26 Cal. 3d 913, 164 Cal. Rptr. 708, 610 P.2d 1038, 1041 (1980) (duty of good faith is reciprocal—neither contracting party may act to injure the rights of the other to benefit by the agreement).

Plaintiff's litigation tactics speak volumes about which party is acting in bad faith. Perhaps the most egregious example of plaintiff's bad faith is that it is seeking fees related to the bankruptcy when it *stipulated* that (1) the Management Agreement could be assumed, withdrawing its objections, (2) no postpetition cures were due and (3) the parties would dismiss

without costs. (*See* previously filed Affidavit of Ivar Chhina ¶ 11, Ex. 6.) Plaintiff is not in a position to accuse ISC of acting in bad faith.

In any event, plaintiff points to no authority that the duty of good faith requires a party to fund litigation seeking to nullify the contract under which the duty allegedly arises or to defeat the defendant's benefits under the contract. Instead, "[w]e are aware of no reported case in which a court has held the covenant of good faith may be read to prohibit a party from doing that which is expressly permitted by an agreement. On the contrary, implied terms should never be read to vary express terms." *Carma Developers v. Marathon Dev. Cal.*, 2 Cal. 4th 342, 6 Cal. Rptr. 467, 826 P.2d 710, 728 (1992). ISC has a right under the Management Agreement to refuse to fund litigation against itself, and plaintiff shows nothing to the contrary. To paraphrase the U.S. Supreme Court's famous observation that the U.S. Constitution "is not a suicide pact,"[3] there is no contractual duty of good faith to affirmatively take efforts to nullify the contract under which the duty arises.

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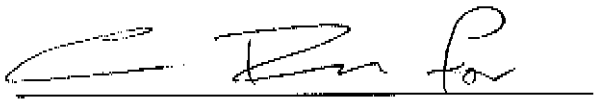
[3] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

III. CONCLUSION

Plaintiff's motion should be denied as procedurally improper and substantially devoid of merit.

DATED: April 12, 2004.

STOEL RIVES LLP



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT/THIRD-PARTY PLAINTIFF INTERDENT SERVICE CORPORATION'S OPPOSITION TO MOTION TO COMPEL PAYMENT OF ATTORNEYS' FEES AND COSTS** on the following named person(s) on the date indicated below by

- " mailing with postage prepaid
- " hand delivery
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to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at his or her last-known address(es) indicated below.

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